

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
September 23, 2008 Session

FLOYD LEON HYATTE v. STATE OF TENNESSEE

**Appeal from the Circuit Court for Rhea County
No. 14812 Buddy D. Perry, Judge**

No. E2007-02646-CCA-R3-PC - Filed January 9, 2009

The Petitioner, Floyd Leon Hyatte, appeals the Rhea County Circuit Court's denial of post-conviction relief. In 1994, the Petitioner was convicted by a jury of first degree murder and, thereafter, sentenced to life imprisonment. On appeal, the Petitioner argues that he was denied his fundamental right to testify and denied the effective assistance of counsel at trial. Following our review, we conclude that the Petitioner has not shown that he is entitled to relief. We affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JERRY L. SMITH, J., joined.

Marshall A. Raines, Jr., Jasper, Tennessee, for the appellant, Floyd Leon Hyatte.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany, Assistant Attorney General; and J. Michael Taylor, District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

Following a jury trial, the Petitioner was convicted of first degree murder, and he received a sentence of life imprisonment. See State v. Floyd Leon Hyatte, No. 03C01-9511-CC-00343, 1997 WL 53454, at *1 (Tenn. Crim. App., Knoxville, Feb. 11, 1997), perm. to appeal denied, (Tenn. Sept. 29, 1997). On direct appeal, this Court summarized the facts established at trial as follows:

On February 14, 1993, Valentine's Day, the [Petitioner] shot and killed Johnny Joe Dillard. The following events led up to the murder. On that Sunday morning, Billy Coleman, Arlene "Sissy" Price, Larry Goss, Johnny Dillard, and James Nixon were "partying", i.e. drinking beer, in James Nixon's apartment in the Taylor Hills Housing Projects in Dayton, Tennessee. Over the course of the day, a few other individuals stopped by, drank beer, and then left.

Later in the afternoon, probably between 4:00 and 5:30 p.m., Billy Coleman and Sissy Price were getting ready to leave the gathering. Suddenly, and for no apparent reason, Johnny Dillard stabbed Billy Coleman in the back with a kitchen knife and ran out the door.¹ Outside the Nixon apartment, ten-year old Bobby Combs witnessed Johnny Dillard run to the top of the Taylor Hills Projects and into the woods behind the residential area.

Combs then went up to the [Petitioner's] residence, which was located near the top of the hill at the Taylor Hills Projects, and told the [Petitioner's] wife that Billy Coleman had been stabbed. Hearing this the [Petitioner] and Greg Garmany left the [Petitioner's] house. On the street outside the house they encountered Bobby Combs and he showed them where Dillard ran into the woods. The [Petitioner] and Garmany walked up to the edge of the woods and as they were coming back into the projects, Bobby Combs overheard one of them saying "let me get this gun out of my pocket and put it in safety." The [Petitioner] and Garmany then got into Sissy Price's light blue Ford Granada and drove away.

On their way through Taylor Hills, the [Petitioner] and Garmany first encountered Maria Jones, who was visiting friends in the area that day. According to Ms. Jones, the [Petitioner] asked her whether she had seen a white man running through the area. The [Petitioner] and Garmany continued driving until they encountered Jamie Johnson, who was in the Taylor Hills Projects helping his sister move. The [Petitioner] asked Mr. Johnson if he had seen a white man, and then told him that the white man had stabbed a friend of his and that "he'd have it took care of."

The [Petitioner's] companion, Greg Garmany, testified as to what happened after they left the Taylor Hills Projects. Garmany testified that he and the [Petitioner] started driving towards an area called Mountain View. After arriving in Mountain View they came to a stop sign, where they decided to wait for a few minutes. Suddenly Johnny Dillard appeared in the distance. The [Petitioner] called his name in an attempt to get him to come to the car. As Dillard approached, the [Petitioner] stuck his left arm through the window holding a .25 caliber handgun and fired at least four shots in Dillard's direction. Garmany testified that he did not know that the [Petitioner] intended to shoot Dillard and that he turned his head away when the [Petitioner] fired the gun. The [Petitioner] and Garmany then left Mountain View and first drove towards Graysville and then turned towards Oster Hill, where the [Petitioner] threw the .25 caliber handgun into some bushes.² The [Petitioner] then

¹ The knife wound in Billy Coleman's back, however serious, was not fatal and after being treated at the Rhea County Emergency Clinic and Erlanger Hospital, he recovered fully.

² Greg Garmany later showed the police where he said the [Petitioner] threw the gun, but in spite of a thorough search the murder weapon was never found.

drove back to Taylor Hills and went to his residence where he was questioned by the police later that evening.

At the scene of the shooting, Dillard apparently managed to walk to a residence on Old Graysville Road. By then the blood loss made him too weak to continue further and he collapsed behind the residence. Maria Poinsett, who was babysitting at the Old Graysville Road residence, discovered Dillard's body between 6:00-6:30 p.m. She called her parents who notified the authorities. The Medical Examiner testified at trial that Johnny Dillard suffered at least three fatal gun shot wounds and that each one of the three wounds would have been sufficient to cause Dillard's death.

Id. at *1-2 (footnotes in original).

Following his conviction and the denial of his direct appeal, the Petitioner filed a petition for post-conviction relief. Counsel was appointed to represent the Petitioner in his post-conviction action, and an amended petition was filed thereafter. The Petitioner raised numerous grounds for relief. Specifically, the Petitioner averred that his appearance in shackles prejudiced his right to a fair trial, that he was denied the opportunity to call witnesses and present certain evidence in his defense, that his conviction was based on a violation of the privilege against self-incrimination, and that he was denied the effective assistance of counsel.

A hearing was held in the post-conviction court. At the hearing, the Petitioner testified that trial counsel requested to be his attorney and informed the Petitioner's wife that he would represent the Petitioner. The Petitioner first encountered trial counsel after his December 8, 1993 arrest while he was incarcerated in the county jail. The Petitioner asserted that this meeting lasted about "15, 20, 30 minutes. It wasn't long." According to the Petitioner, trial counsel inquired if he committed the murder, to which the Petitioner said no. Trial counsel then said, "Okay," followed by, "I'll get back in touch with you."

The Petitioner confirmed that his first trial resulted in a mistrial and that he was tried again in November 1994. He testified that he did not meet trial counsel again until the day of his first trial in October 1994. He then clarified that he saw trial counsel one other time, about a week before trial, to discuss a plea bargain offer from the State. The Petitioner claimed that he asked trial counsel for his opinion about the plea offer, and trial counsel stated that "he could beat the case" and to take the case to trial.

The Petitioner testified that, at his initial interview, trial counsel questioned him about where he had been on the day of the murder, and the Petitioner provided the details of that day to trial counsel. Moreover, the Petitioner gave trial counsel the names of witnesses who could verify his whereabouts. According to the Petitioner, trial counsel interviewed only the Petitioner's wife, brother, and sister, but he did not question any of the other witnesses provided by the Petitioner. When asked if trial counsel informed the Petitioner of the results of these interviews, the Petitioner responded that he did not and that he attempted to contact trial counsel by telephone, to no avail. According to the Petitioner, trial counsel "said that he didn't want to talk over the telephone, because

he felt that his phone was bugged. He put it like, they were watching him, and I didn't know who they were." The Petitioner's wife also tried to contact trial counsel but was unsuccessful.

The Petitioner testified that numerous witnesses were called to testify at his trial, including at least four or five witnesses, some family members, on his behalf. According to the Petitioner, his witnesses testified to an alibi, that he was at home when the killing occurred.

During his trial, trial counsel and the Petitioner discussed the Petitioner's right to testify on his own behalf. When asked about the content of this discussion, the Petitioner relayed, "[H]e'd asked for a recess for a few minutes to get basically a cigarette break, and we went outside and I told him I needed to testify, because . . . I felt that the State witnesses were lying and I needed to get on the stand to defend myself."

According to the Petitioner, trial counsel advised the Petitioner not to testify and, thereafter, the two men argued because the Petitioner insisted in his desire to take the stand. Trial counsel then stated the Petitioner, "I'll tell you what we'll do, we're going to put you on the stand. . . . As soon as we get in there I'm going to ask the [j]udge to give me some extended time so I can prepare you as a witness."

The Petitioner testified that his testimony at trial was necessary to rebut the testimony of Bobby Combs, Maria Jones, Jamie Johnson, and particularly, Greg Garmany. When asked how his testimony would have rebutted Garmany's, the Petitioner replied that Garmany was lying, as the Petitioner did not accompany Garmany and did not do any of the things Garmany said he did. Moreover, the Petitioner wanted to convey to the jury that he was at his home lying on his couch, thereby contradicting the testimony of Maria Jones and Jamie Johnson.

However, once they returned to courtroom after the break, they sat down and "the next thing [the Petitioner] knowed [sic] there were closing arguments." The Petitioner testified that he "missed a beat" and that trial counsel did not "say anything about [the Petitioner] wanting to testify or anything. Didn't ask for any time . . . to get prepared or anything." According to the Petitioner, he was not "given a choice." Furthermore, the Petitioner was not questioned in open court about his desire to testify on his own behalf.

During the trial proceedings, trial counsel was romantically involved with the Petitioner's sister. According to the Petitioner, he became aware of this relationship when trial counsel failed to show up for a motion hearing, and his wife informed him of the relationship. The relationship ended during trial counsel's representation of the Petitioner on appeal. The Petitioner testified that, following their separation, trial counsel would not accept the Petitioner's telephone calls and would not reply to the Petitioner's letters.

After the trial, the Petitioner wrote a letter to the trial judge and to the Board of Professional Responsibility regarding trial counsel's representation. The Petitioner testified that counsel did not keep him informed about his appeal and that the denial of his right to testify was not raised as an issue on appeal.

On cross-examination, the Petitioner acknowledged that trial counsel's first action in this case was to file a motion to get the Petitioner released on bond but that the motion was unsuccessful. Trial counsel also filed a motion to suppress the Petitioner's statements to Officer Billy Cranfield and other motions.

The Petitioner confirmed that Michael Hyatte, one of the Petitioner's proposed alibi witnesses, had some felony convictions at the time of trial, which may have been the reason trial counsel did not call him to testify. The Petitioner further acknowledged that trial counsel did present witnesses in support of the Petitioner's alibi defense. The Petitioner opined that the State's witnesses changed their testimony from the first trial. The Petitioner also asserted that he had proof that some of the State's witnesses were lying.

The Petitioner acknowledged that he had a previous criminal history, which could have been used against him if he chose to testify. Moreover, one of the "main grounds" raised in his motion for a new trial and as an issue on direct appeal concerned the Petitioner's election not to testify—the jury improperly considered his decision not to testify in rendering its verdict. As additional grounds for relief in the motion for a new trial, defense counsel alleged that the trial court erred in refusing to suppress the Petitioner's statement, alleged a violation of double jeopardy, alleged that the jury was the victim of terrorist threats, alleged insufficient proof, and alleged that Greg Garmany was under the influence of narcotics and drugs.

The Petitioner confirmed that he proclaimed his innocence throughout the trial. The Petitioner asserted that trial counsel did not do enough to attack Garmany at trial. According to the Petitioner, if trial counsel had interviewed the State's witnesses, then counsel would have discovered who was present on the scene when the victim was killed.

The State showed the Petitioner a letter he wrote to the trial judge inquiring about the status of his notice of appeal. In the letter, the Petitioner states, "I feel [trial counsel] did a fairly decent job more perhaps as good a job as possible for him, but, I no longer have any confidence in him to permit him to handle the appeal." The Petitioner acknowledged that he signed the letter but maintained that he did not make that statement. According to the Petitioner, someone else typed the letter for him because he could not type.

On redirect examination, the Petitioner testified that he also conversed with trial counsel by telephone on two or three occasions. However, he claimed that trial counsel stated he could not talk or discuss the case over the telephone and that trial counsel would not come to the jail. He also stated that he did not have any discussions with trial counsel about the case after his first trial.

The Petitioner stated that he was not aware of trial counsel's ineffectiveness when he signed the letter. He also clarified that he did not like the wording of the letter but that he signed it anyway.

The Petitioner opined that trial counsel did not do a good job in representing him. A time sheet reflecting the amount of time trial counsel worked on the Petitioner's case was entered into evidence. The document showed that trial counsel spent 32.3 "out of court" hours and 21.0 "in

court” hours working on the Petitioner’s case. The Petitioner stated that this information would have affected his opinion about trial counsel’s representation before he signed the letter.

The Petitioner then called Graham Swafford to testify as an expert. Mr. Swafford stated that he had tried murder cases in the Twelfth Judicial District and that he was familiar with the standard of care for a defendant in a criminal case. Mr. Swafford confirmed that, in 1993, a criminal defendant did not testify under oath and on the record regarding waiver of his right to testify. Mr. Swafford testified that, if a defendant clearly expressed a desire to testify in spite of counsel’s advice not to do so, then the standard of care required counsel to allow the defendant to take the stand on his own behalf. If trial counsel did not allow the Petitioner to testify, then the Petitioner was denied his constitutional right to testify in his own defense.

Mr. Swafford further opined that trial counsel’s relationship with the Petitioner’s sister was improper. When asked about trial counsel’s preparation, Mr. Swafford responded, “Thirty-two point three (32.3) [“out of court” hours] for a first degree murder case, that’s clearly inadequate for a number of reasons and that is not consistent with the standard of care anywhere.” He also commented that the time sheet did not reflect any time spent preparing the witnesses to testify, which was “very important” preparation for trial. Regarding the amount of time trial counsel spent discussing the plea offer with the Petitioner (1.6 hours), Mr. Swafford stated the amount of time was insufficient and fell below the standard of care. Mr. Swafford also relayed that, based upon the Petitioner’s testimony at the post-conviction hearing, trial counsel did not spend enough time with the Petitioner discussing his case.

On cross-examination, Mr. Swafford was asked about trial counsel’s reputation, responding as follows: “I was aware of his reputation, and I was aware that it was a reputation that at times it was a good reputation and I was aware at times it was a questionable reputation.”³

Trial counsel did not testify at the post-conviction hearing.

After hearing the evidence presented, the post-conviction court denied relief by written order of November 21, 2007.⁴ This appeal followed.

Analysis

On appeal, the Petitioner presents two arguments for our review. First, he argues that the trial court erred in failing to grant him a new trial after the proof established that he was denied his

³ An additional hearing was held on March 10, 2005. The hearing concerned trial counsel’s alleged ineffectiveness regarding presentation of a videotape. At the conclusion of the hearing, the issues were summarized, and each side gave closing arguments. The post-conviction court reserved ruling on the issues.

⁴ The post-conviction court framed the issues as follows: (1) The trial court failed to instruct the jury as to the defense of alibi; (2) The trial court failed to properly instruct the jury as to the lesser included offenses of the indicted offense of murder in the first degree; (3) The Petitioner was denied his constitutional right to testify in his own behalf at trial; and (4) The Petitioner was denied his constitutional right to the effective assistance of counsel at trial.

constitutional right to testify and that such denial was not harmless error. Next, he submits that trial counsel failed to provide the effective assistance of counsel guaranteed him by the United States and Tennessee constitutions.

To sustain a petition for post-conviction relief, a petitioner must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. See Tenn. Code Ann. § 40-30-110(f); Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999). Upon review, this Court will not reweigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the post-conviction judge, not the appellate courts. See Momon, 18 S.W.3d at 156; Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). The post-conviction judge's findings of fact on a petition for post-conviction relief are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates against those findings. See Momon, 18 S.W.3d at 156; Henley, 960 S.W.2d at 578.

The Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to "reasonably effective" assistance, that is, within the range of competence demanded of attorneys in criminal cases. Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer's assistance to his or her client is ineffective if the lawyer's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the defendant's lawyer and actual prejudice to the defense caused by the deficient performance. Id. at 687; Burns, 6 S.W.3d at 461. The defendant bears the burden of establishing both of these components by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The defendant's failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

In evaluating a lawyer's performance, the reviewing court uses an objective standard of "reasonableness." Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel's choices "and should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel's tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel's alleged errors should be judged in light of all the facts and circumstances as of the time they were made, see Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

A trial court's determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court

reviews the trial court's findings of fact with regard to the effectiveness of counsel under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. Id. "However, a trial court's conclusions of law—such as whether counsel's performance was deficient or whether that deficiency was prejudicial—are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court's conclusions." Id. (emphasis in original).

I. Right to Testify

The Petitioner contends he informed trial counsel that he wanted to testify on his own behalf, but trial counsel rested the case without allowing the Petitioner to take the stand. The Petitioner contends that the trial court denied him his right to testify in his own defense in violation of the constitutional requirements set forth in Momon, 18 S.W.3d 152.

The State argues the Petitioner has waived this issue by failing to present it on direct appeal. Failure to present a ground for relief on direct appeal constitutes waiver absent certain circumstances inapplicable to the Petitioner's case. See Tenn. Code Ann. § 40-30-106(g). Initially, we conclude the Petitioner has waived this issue. In any event, the procedural requirements set forth in Momon would afford the Petitioner no relief in this case.

In Momon, our supreme court recognized that "the right of a criminal defendant to testify in his or her own behalf is a fundamental constitutional right." 18 S.W.3d at 161. Accordingly, "the right may only be waived personally by the defendant." Id. Because the right to testify is both fundamental and personal, it "may only be waived if there is evidence in the record demonstrating 'an intentional relinquishment or abandonment of a known right or privilege.'" Id. at 162 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). Thus, "[t]he waiver of a fundamental right will not be presumed from a silent record, and the courts should indulge every reasonable presumption against the waiver of a fundamental right." Id. (citations omitted).

However, the trial in this case occurred prior to Momon, and Momon has no retroactive effect. Id. at 162-63 (holding "that neither the right to testify discussed herein, nor the procedural protections adopted to preserve that right are new constitutional rules which must be retroactively applied"). Nonetheless, if the Petitioner was actually denied his right to testify by his trial counsel, there is constitutional error. Id. Thus, while the 'prophylactic' procedures set forth in Momon are not mandatory in the present case, we nonetheless refer to the principles expressed in the case as guidelines. See Terrance B. Smith v. State, No. W2004-02366-CCA-R3-PC, 2005 WL 2493475, at *6 (Tenn. Crim. App., Jackson, Oct. 7, 2005). The Momon Court provided instructive, nonexclusive factors to assist a court in determining whether an error in denying a defendant his right to testify is harmless beyond a reasonable doubt: (1) the importance of the defendant's testimony; (2) the cumulative nature of the testimony; (3) the presence or absence of evidence corroborating or contradicting the defendant on material points; and (4) the overall strength of the prosecution's case. 18 S.W.3d at 168.

In this case, trial counsel did not testify, and other than the Petitioner's testimony, the record is sparse as to whether the Petitioner personally waived his right to testify at trial. See also Derrick Quintero v. State, No. M2005-02959-CCA-R3-PD, 2008 WL 2649637, at *42 (Tenn. Crim. App.,

Nashville, July 7, 2008, perm. to appeal granted in part and denied in part (Tenn. Dec. 12, 2008). The post-conviction court essentially conducted a harmless error analysis, reasoning as follows:

After the Petitioner's conviction, the Petitioner's [c]ounsel, both at the hearing of the [m]otion for [n]ew [t]rial in this case, and on direct [a]ppeal, argued that the trial [j]ury improperly considered the Petitioner's failure to testify in his own behalf. This issue was overruled by this [c]ourt, and the said ruling was affirmed on direct [a]ppeal to the Tennessee Court of Criminal Appeals. At no time did the Petitioner indicate that he had, in fact, desired to testify in his own behalf; or that he was wrongfully prevented from so doing by his [c]ounsel. In fact, the Petitioner even wrote a letter to this [c]ourt after his conviction, expressing his satisfaction with the representation afforded him by his trial counsel.

It is obvious from the proof in this record that [c]ounsel's decision not to put the Petitioner on the stand to testify in his own behalf was a tactical decision based upon numerous factors. First, [c]ounsel for the Petitioner had presented a two pronged defense. Counsel first presented, through various witnesses, a [d]efense of [a]libi on behalf of the Petitioner. Counsel also engaged in a careful cross-examination of the State's key witnesses in an effort to discredit the reliability of their testimony which connected the Petitioner to the homicide in question. Second, defense [c]ounsel placed proof before the [j]ury which would indicate that another person had more of a motive to kill the victim in this case than did the Petitioner, and suggested that the other person was, in fact, the actual killer.

Once the [a]libi defense had been established by the various [d]efense witnesses, the Petitioner could only have testified in line with the evidence already presented in this regard, thus making his testimony only cumulative. Further, by testifying, the Petitioner would have been subjected to cross-examination by the State, and would, in essence, have been forced to either agree that the State's witnesses . . . were correct, (a highly unlikely situation), or assert that the witnesses were either all lying or all mistaken. . . . Additionally, it is to be noted that the State, . . . would have been able to cross-examine the Petitioner as to prior criminal convictions, which included convictions for the felonies of [t]heft, and [r]obbery, which would have seriously reflected on the Petitioner's credibility. Under the circumstances, it is readily apparent as to why [the] Petitioner's [c]ounsel would not have wanted him to testify.

We agree with the thorough analysis of the post-conviction court and conclude that any error in this respect was harmless beyond a reasonable doubt. Moreover, the harmless nature of the error results in the conclusion that the Petitioner has failed to prove by clear and convincing evidence that he suffered prejudice necessary to establish ineffective assistance of counsel. See Smith, 2005 WL 2493475, at *9.

II. Ineffective Assistance

In this appeal, the Petitioner contends that the representation he received from his trial counsel was ineffective. The Petitioner's general allegations can be summarized as follows: (1) trial counsel failed to adequately prepare for trial; (2) trial counsel failed to meet with him a sufficient number of times; (3) trial counsel failed to discuss the facts of the case and possible defense strategies with him; (4) trial counsel failed to investigate the Petitioner's case by interviewing potential alibi witnesses; and (5) trial counsel's relationship with the Petitioner's sister created a conflict of interest in counsel's representation of him at trial and on direct appeal.

The post-conviction court again made detailed findings on the issue and found that the Petitioner received the effective assistance of counsel, concluding as follows:

It is clear from the record in this cause that [the] Petitioner's [c]ounsel did much more in the defense of this matter than the Petitioner would credit him. Defense [c]ounsel filed numerous pre-trial motions, including, among other[s], [m]otions to [s]uppress [s]tatements, [c]ompel [p]roduction of [e]vidence, [m]otions for [d]iscovery, and [n]otice of an [a]libi [d]efense, supported by a list of potential witnesses. Defense [c]ounsel presented the classic case of [a]libi in this cause, and further, did an effective job of challenging the credibility of the State's primary witnesses. Defense [c]ounsel was further able to produce evidence which indicated the existence of another person who possesses far more motive to do the victim harm than did the Petitioner. The allegations that [d]efense [c]ounsel failed to adequately confer with the Petitioner, and failed to adequately investigate the case are not supported by the record in this cause. It is clear that [d]efense [c]ounsel did, in fact, investigate the case, as he was able to produce various witnesses who attempted to establish an [a]libi for the Petitioner at the time of the homicide. Counsel was further able to produce evidence which indicated that at least one of the State's potential witnesses could not have been present in Rhea County at the time of the commission of the offense in this case, thereby discrediting the testimony of another State's witness who asserted that the other person was, in fact, present.

. . . In all fairness, it is difficult for the [c]ourt to see what additional efforts [d]efense [c]ounsel could have made in order to properly defend his client in this case.

The Petitioner alleges that his [d]efense [c]ounsel carried on some type of "relationship" or "affair" with the Petitioner's sister during the trial of this case, and that the same continued until this case was in the process of direct appeal. This is an assertion which is not corroborated by independent proof. However, assuming the allegation to have a basis in fact, it does not appear that this "relationship" prevented [the] Petitioner's [c]ounsel from providing the Petitioner with effective representation. While on its face, such a situation might be seen as inappropriate behavior on the part of [the] Petitioner's [c]ounsel, there is simply nothing in this record which would show that as a result of this situation, [the] Petitioner's [c]ounsel failed to afford the Petitioner effective representation in the trial of this case.

Again, the record supports the post-conviction court's findings. The Petitioner's testimony was cumulative to his alibi defense and would mostly likely not have aided in his defense. The proof showed that trial counsel and the Petitioner met to prepare for trial and that the lines of communication were open and used by both the Petitioner and his trial counsel, allowing the Petitioner to make well-informed decisions and assist in his defense. The record does not establish that an actual conflict existed by trial counsel's relationship with the Petitioner's sister and, moreover, there is no proof that the relationship had any effect upon his representation of the Petitioner.

We conclude that the Petitioner failed to demonstrate that he is entitled to receive post-conviction relief. Accordingly, the post-conviction court did not err by dismissing the petition for post-conviction relief.

Conclusion

Based upon the foregoing, the Rhea County Circuit Court's denial of post-conviction relief is affirmed.

DAVID H. WELLES, JUDGE